Santosh

# IN THE HIGH COURT OF BOMBAY AT GOA

## FIRST APPEAL NO. 66 OF 2022

Iffco Tokio General Insurance Co.Ltd.,
Having its Office at A/2, Reliance House,
lsidorio Baptista Road,
Pajifond, Margao Goa
Through its Authorized Signatory
Mr. Amol Arunrao Bidwai , … Appellant.
Age 40 years.

*Versus*

1) Smt. Namrata Rajesh Prabhudessai,
Widow of late Rajesh Prabhudessai,
Aged about 35 years, Housewife,
Residing at H. No. 854, Shelim, Loliem,
Canacona, Goa 403 702

2) Master Veer Rajesh Prabudessai,
Aged about 9 years Son of late Rajesh
Prabhudessai, student, Residing at H. No
854
Shelim, Loliem, Canacona, Goa 403 702
Through his mother, natural and legal
Guardian, Smt. Namrata Rajesh
Prabhudessai,

3) Smt. Radhabai Bhiku Prabhudessai,
aged about 70 years | Wife of late Bhiku
Prabhudessai Housewife, residing at H.
No.854 Shelim, Loliem, Canacona, Goa.

4) Shri Mahammed Rahamatullah Maniyar,
Son of Shri Rahamatullah Maniyar,
Aged about 36 years, driver, r/o 309, near
Narrow Gate, Mugali, Chandor Salcete, Goa
Presently working at Menino Garage, Near
Maria Hall, Benauali, Salcete, Goa.

5) Shri Jose Fernandes,
s/o George Fernandes , owner, major of age,
residing at H. No.6 1 5-C, Chandwado,
Fatorda, Margao-Goa

6. Shri Sandeep Komarpant,
Major of age, Insured, H.No. 509, …Respondents.
Develog Palolem, Canacona, Goa.

**Mr Amey J. Sinai Kakodkar with Mr Akshay Naik, Advocates** *for the Appellant.*

**Ms Annelise Fernandes, Advocate** *for Respondents No.1 to 3.*

**Mr Shailesh Redkar with Mr I Santimano, Advocates** *for Respondent No.4.*

**CORAM : M. S. SONAK J.**

**DATE : 21st April 2023**

**ORAL JUDGMENT :**

***1.*** Heard Mr Kakodkar for the Appellant, Ms Annelise Fernandes, Advocate for Respondents No. 1 to 3 (Claimants) and Mr Shailesh Redkar for Respondent No.4 (driver).

***2.*** This Appeal is directed against the Judgment and Award dated 30th June 2019 in Claim Petition No.60/2017, by which the Motor Accident Claims Tribunal, at Margao (Tribunal), has awarded the Claimants compensation of ₹34,30,000/-, with interest at the rate of 6% per annum from the date of institution of the Claim Petition, till realization of the awarded amount.

***3.*** Mr Kakodkar, learned Counsel for the Appellant Insurance Company, submits that the Insurance Company duly obtained leave under Section 170 of the Motor Vehicles Act. Further, he offers that the evidence on record shows that the deceased, who was driving a Honda scooter, was negligent and, therefore, the Claim Petition should have been dismissed.

***4.*** Mr Kakodkar submits that the Claimants examined no witnesses regarding the accident's genesis. Instead, the Insurance Company examined the Maruti Alto car driver (Respondent No.4), who deposed that the deceased suddenly turned to the right side. Consequently, the Maruti Alto car driver could not avoid the dash to the deceased's Honda scooter in the rear. Mr Kakodkar submitted that the Maruti Alto car driver was prosecuted but acquitted from the charge of rashness and negligent driving. Based upon all this, Mr Kakodkar submitted that there was no negligence on the Alto Card driver's part; therefore, the Claim Petition should have been dismissed.

***5.*** Mr Kakodkar, without prejudice to the above contentions, submits that there was no legal evidence to sustain the finding that the deceased was earning ₹30,000/- per month. He offers that no receipts or any other proof of income were produced on behalf of the Claimants. No income-tax returns were also produced. The claim that the deceased owned milch cows and supplied milk to the dairy society is not proven. The claim that the Claimant was a milk supplier and tailor and engaged in hiring out weed cutting machine cannot be believed. There is no documentary evidence in support of such a claim.

***6.*** Mr Kakodkar submits that the Tribunal could have, at the most, proceeded based on some notional income without evidence about the deceased earning ₹30,000/- per month. Mr Kakodkar submits that the testimony of the Claimants' witnesses is not creditworthy and does not inspire any confidence.

***7.*** For all the above reasons, Mr Kakodkar submits that the compensation award must be scaled down considerably.

***8.*** Ms Fernandes learned Counsel for the Claimants, defended the impugned Award based on the reasoning reflected therein. She submitted that an FIR was filed against the car driver, and his subsequent acquittal is irrelevant. She offered that the Police documents are sufficient to establish negligence, particularly since the car driver dashed the deceased's Honda scooter from the rear on a straight road.

***9.*** Ms Fernandes submits that the evidence on record shows that the deceased used to earn ₹30,000/- per month. She proposes that the Claimants are a widow, a seven-year-old minor son and the aged mother of the deceased. She submits that some guesswork is permissible in such matters, and the same is within reasonable bounds.

***10.*** Mr Fernandes submits that the Tribunal failed to account for future prospects and failed to award a consortium amount to each of the Claimants. Therefore, she proposes enhancing the compensation amount to represent a just compensation.

***11.*** Mr Redkar learned Counsel submits that Respondent No. 4 was not negligent and the accident occurred due to negligence on the part of the deceased. The Redkar offers that the Alto Maruti car was insured in any case and, therefore, the liability would fall mainly on the Insurance Company.

***12.*** The rival contentions now fall for my determination.

***13.*** The factum of the accident is admitted. Similarly, the fact that Rajesh Prabhudessai (deceased) died in this vehicular accident is also accepted. The FIR was filed against the Alto car driver (Respondent No.4). This aspect is also admitted.

Respondent No.4, who deposed in this matter, did not depose about filing any complaint to the superior Police Officer for registration of the FIR against him. There is also no dispute that the FIR, after investigations, culminated in filing of a charge sheet before the competent Court. Further, there is evidence about Respondent No. 4's acquittal.

***14.*** Based upon the above admitted facts, the following points arise for determination :

(A) Whether it is proved that the accident in which Rajesh Prabhudessai died was due to rashness and negligence of the Alto Car driver, or whether Rajesh Prabhudessai was responsible for the accident, or whether Rajesh Prabhudessai contributed to the accident to some extent?

(B) Does the quantum of compensation awarded represent a just compensation?

***15.*** On the first point for determination, although, indeed, the Claimants have not led any evidence about the genesis of the accident, the documentary evidence establishes that an FIR was filed against the Alto car driver (Respondent no.4). The evidence also shows that Respondent No.4 did not react to the FIR being filed against him.

***16.*** The circumstance in which Respondent No.4 was acquitted is irrelevant. The standard of proof in a criminal case is proof beyond a reasonable doubt. In contrast, claim petitions are to be decided based on the standard of preponderance of probabilities.

***17.*** The scene of the accident panchanama, sketch and the fact that the accident occurred on a straight road when the Alto car and the Honda scooter were travelling in the same direction is relevant. But, again, the most pertinent circumstance is that the Alto car dashed the Honda scooter, which the deceased was riding, from the rear. Based upon this evidence, the Tribunal has correctly concluded that the accident occurred due to rash and negligent driving by Respondent No.4, i.e. the driver of the Alto car.

***18.*** The Tribunal has refused to look into the deposition of the Alto car driver (Respondent No.4) on the ground that Respondent No.4 failed to appear in the Claim Petition and file a written statement. Because Respondent No.4 failed to contest the Claim Petition, the Insurance Company sought and was granted leave under Section 170 of the Motor Vehicles Act. After that, the Insurance Company summoned Respondent No.4 to depose in the matter. Therefore, Respondent No. 4's deposition could not have been ignored on the ground that Respondent No.4 had failed to file a written statement. In such a situation, the deposition of Respondent No.4 was required to be evaluated. However, even after assessing Respondent No. 4's deposition, there is sufficient evidence to hold that Respondent No. 4's negligence was established on the touchstone of preponderance of probabilities.

***19.*** Respondent No.4, in his deposition, spoke about the deceased suddenly turning to the right. Except for this solitary statement, which was challenged during the cross-examination, there is no evidence to suggest any negligence by Rajesh Prabhudessai (deceased). However, considering the documentary evidence on record and the circumstances referred to above, a case of rashness and negligence on the Alto car driver's part is indeed made out by applying the standard of preponderance of probabilities.

***20.*** The Tribunal, in this case, has adopted the correct approach in deciding the issue of rashness and negligence. In cases of ***Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Ant.*** - (2013) 10 SCC 646, ***Mangala Ram vs. Oriental Insurance Co. Ltd.*** - (2018) 5 SCC 656, ***Sunita And Others vs. Rajasthan State Road Transport Corporation And Others*** - (2020) 13 SCC 486, ***Anita Sharma and others vs New India Assurance Company Limited and another*** - (2021) 1 SCC 171, ***Parmeshwari vs Amir Chand & Ors***. - (2011) 11 SCC

635 and ***Vimla Devi & Ors. vs National Insurance Company Ltd.*** - (2019) 2 SCC 186, the Hon'ble Supreme Court had held that the approach of Courts and Tribunals, when dealing with such matters, has to be sensitive enough to appreciate the turn of event on the spot or the hardship that the Claimants usually face in tracing witnesses and collecting information for an accident when they were themselves not present at the accident spot. Further, the Courts/Tribunals must be mindful that strict principles of evidence and standard of proof, like in a criminal trial, are inapplicable in MACT claim cases. The standard of proof in such matters is one of the preponderance of probabilities rather than proof beyond a reasonable doubt.

***21.*** The Courts/Tribunals have to be mindful that the approach and role of Courts/Tribunals while examining evidence in accident claim cases ought not to be to find fault with the nonexamination of some best eyewitnesses, as may happen in a criminal trial; but instead should be only to analyze the material placed on record by the parties to ascertain whether the Claimant's version is more likely than not true. They must take a holistic view bearing in mind that strict proof of an accident caused by a particular vehicle in a specific manner often cannot be adduced by the claimants. The Courts/Tribunals should also draw appropriate inferences from the failure of Respondents to properly cross-examining the witnesses of the claimants or confront them with their version despite the adequate opportunity. They must consider the legal effect of failing to cross-examine crucial witnesses on crucial issues.

***22.*** In *Anita Sharma* (supra), the Hon'ble Supreme Court has reiterated that the standard of proof in accident claim cases is that of the preponderance of probabilities, not beyond a reasonable doubt. The Court held that, therefore, the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with the nonexamination of some best eyewitnesses, as may happen in a criminal trial, but, instead, should be only to analyze the material placed on record by the parties to ascertain whether Claimant's version is more likely than not true.

***23.*** In *Sunita & Ors* (supra), the Hon'ble Supreme Court held that the Tribunal had correctly accepted the Claimant's contention that the Respondents did not challenge the propriety of the FIR and the charge sheet before any authority. The only defence raised by the Respondents to this plea was that the FIR was based on wrong facts and was filed in connivance between the complainants and the police, against which the Respondents had complained to the superiors, but to no avail. The Hon'ble Supreme Court noted that apart from this bald assertion, no evidence was produced by the Respondents before the Tribunal to prove this point. The filing of the FIR was followed by the filing of the charge sheet for offences under Sections 279, 337, and 304-A of IPC and Sections 134/187 of the MV Act, which, again, reinforces the allegations in the said FIR insofar as the occurrence of the accident was concerned and the role of the driver in causing such accident.

***24.*** Accordingly, the first point for determination will have to be decided against the Appellant-Insurance Company and favouring the Claimants.

***25.*** On the aspect of quantum of compensation, although the Claimants may have produced no receipts or direct proof of income, Rajesh's wife has deposed to Rajesh undertaking the business of milking about 20 milch cows and supplying milk to the dairy society and others in the locality. Moreover, she has deposed that Rajesh was a qualified tailor who had worked in Gulf for substantial periods. She also deposed about Rajesh purchasing a weed-cutting machine and hiring it for the local farmers. Based on this, Rajesh's wife has deposed that Rajesh used to earn around ₹35,000/- per month.

***26.*** The Claimants examined Harish Prabhugaonkar and Vijaykumar Prabhugaonkar, who were friends of Rajesh. Harish was a relative of Rajesh. Both these witnesses deposed about Rajesh supplying milk to them and the dairy society, of which they were office bearers. They also deposed about Rajesh being a tailor and hiring out the weed-cutting machine to the local farmers.

***27.*** Based on their evidence and in the absence of any documentary evidence about the income like receipts, income tax returns, Rajesh's income could be legitimately considered around ₹25,000/- per month. This corresponds to approximately ₹750/- to 800/- per day, which Rajesh must have been earning by supplying milk, tailoring and hiring out the weed cutting machine to the local farmers. In such matters, some element of guesswork is permissible. The circumstance that Rajesh has, in the past, worked in Gulf is also not irrelevant. No significant dent was made in the evidence of the Claimants' witnesses.

***28.*** The Tribunal was justified in deducting 1/3rd of the income towards personal expenses that Rajesh would have incurred. But, the Tribunal erred in not adding 25% towards future prospects. Given the law in National Insurance Co. Ltd. Vs. Pranay Sethi & Ors, such an addition was necessary. – (2017) 16 SCC 680 and ***Sarla Verma vs DTC***.- (2009) 6 SCC 121. With this addition, Rajesh's income would have to be taken at ₹31,250/- After deducting 1/3rd, the same would come to ₹20,834/-. Based on all this, the compensation towards dependency, taking the multiplier of 14, would come to ₹35,00,112/-.

***29.*** To the above amount, each of the Claimants would be entitled ₹40,000/- towards consortium, i.e. a total of ₹1,20,000/-. In addition, the Claimants would be allowed to ₹15,000/- loss of estate and another ₹15,000/- towards funeral expenses. Thus, the just compensation would work out to ₹36,50,112/-.

***30.*** Even though the Claimants may not have appealed or filed cross objections, the Court must award the Claimants a just compensation which, in the present case, comes to ₹ 36,50,112/- even after partially accepting Mr Kakodkar's contention that Rajesh's monthly income should be scaled down.

***31.*** The directions in the impugned Award regards investments, etc., are maintained. However, it is clarified that after Respondent No.2 attains a majority, the invested amount should be released to Respondent No.2 upon obtaining adequate proof of majority.

***32.*** The Appellant-Insurance Company has already deposited the awarded amount in this Court. Mr Kakodkar states that the balance amount, in terms of this judgment and Award, would be deposited within 8 (eight) weeks from today.

***33.*** Accordingly, the Claimants are permitted to withdraw the compensation amount in terms of the impugned Award, as modified by this Court's Judgment and Order, by adopting the usual formalities. The Registry should consider the direction for investments made in the impugned Award and permit the withdrawal of only the balance amount.

***34.*** Accordingly, this Appeal is dismissed, but the just compensation is determined at ₹36,50,112/-, which the Appellant-Insurance Company must first pay to the Claimants. No costs.

**M. S. SONAK, J.**

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